

FCC MAIL SECTION
Before the
Federal Communications Commission
Washington, D.C. 20554

JUL 6 4 11 PM '94

GC Docket No. 92-52 ✓

DISPATCHED BY

In the Matter of

Reexamination of the Policy	RM-7739
Statement on Comparative	RM-7740
Broadcast Hearings	RM-7741

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: June 13, 1994;

Released: June 22, 1994

Comment Date: July 22, 1994

Reply Date: August 8, 1994

By the Commission: Commissioners Ness and Chong not participating.

I. INTRODUCTION

1. In this notice, we solicit further comments on the modification of the criteria used in comparative hearings to award construction permits for new broadcast facilities. We ask commenters in this proceeding to address several additional questions arising from *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

II. BACKGROUND

2. We initiated this proceeding to reform the criteria used to select among mutually exclusive applicants for new broadcast facilities. *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992). See also *Reexamination*, 8 FCC Rcd 5475 (1993). We noted that these criteria had not been comprehensively examined for 27 years and that changes in the broadcast marketplace, in broadcast technology, and in the Commission's regulatory policies for broadcasting now warranted reexamination of the criteria. 7 FCC Rcd at 2664 ¶ 2.

3. In response to our notice of proposed rulemaking, we received numerous comments concerning: (1) whether the existing comparative criteria should be modified or eliminated; (2) whether new criteria should be adopted; and (3)

whether the Commission should adopt a point system with a tie-breaker to decide comparative cases. These comments are currently under consideration.

4. Recently, the United States Court of Appeals for the District of Columbia Circuit issued a decision regarding the Commission's comparative process in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).¹ The court ruled that the integration of ownership into management, one of the principal criteria used in evaluating applicants for new broadcast facilities, is arbitrary and capricious and therefore unlawful. The court directed the Commission to evaluate applications before it under standards free of the integration criterion.

5. Because integration and factors deemed to enhance integration have been decisionally significant in many recent comparative proceedings, we stayed pending cases while we considered appropriate action responsive to the court's opinion. *Public Notice*, FCC 94-41 (Feb. 25, 1994).²

III. DISCUSSION

6. The court's opinion in *Bechtel* clearly has relevance to our efforts in this rulemaking to reform the comparative process. Not only has the court invalidated a factor central to the Commission's comparative process, but the court's analysis raises questions potentially bearing on other comparative criteria as well. Thus, although the comments already received provide useful guidance for the Commission, we find it desirable to solicit further comments in light of *Bechtel*.

7. The commenters should address how the Commission can comply with *Bechtel*. They should consider what objective and rational criteria can be used to evaluate the applicants' comparative qualifications in light of *Bechtel*. In particular, the commenters should address the impact of *Bechtel* on the factors previously considered to enhance integration: local residence and civic participation, minority status,³ and broadcast experience. The commenters should also discuss the relative weight that should be given to the various comparative criteria in an analysis that does not rely on integration.

8. Additionally, commenters should address the procedural ramifications of applying a revised comparative analysis to pending cases. For example, commenters may wish to consider under what circumstances it would be appropriate to permit applicants in pending cases to amend their proposals in light of newly-adopted standards and when further evidentiary proceedings would be warranted.

9. Finally, in responding to this notice, commenters may wish to consider how any proposed revision of the comparative analysis could be structured to satisfy the kind of concerns which, in *Bechtel*, resulted in a determination that integration was arbitrary and capricious.⁴

¹ In initiating this rulemaking, the Commission took note of an earlier decision by the court in the *Bechtel* case. 7 FCC Rcd at 2664 ¶ 4. See *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992).

² At that time, further appropriate action included the possibility of seeking Supreme Court review of *Bechtel*. Since then, the Commission has decided not to appeal *Bechtel*, and the case has become final. We have concluded that further action in this proceeding is the appropriate means of responding to *Bechtel*.

³ Our policy of awarding minority preferences is subject to

language which Congress has, since 1987, included in appropriations legislation prohibiting the Commission from repealing or reexamining its policies to expand minority ownership in broadcasting. Pub. L. 103-121, 107 Stat. 1153 (Oct. 27, 1993). Accordingly, as we explained in our original notice of proposed rulemaking, this proceeding will not occasion any diminution of the credit that minorities currently receive in comparative proceedings or otherwise weaken the Commission's commitment to expand minority ownership. 7 FCC Rcd at 2667 ¶ 24.

⁴ One of the bases cited by the court for questioning the

IV. PROCEDURAL MATTERS**A. EX PARTE RULES -- NON-RESTRICTED PROCEEDING**

10. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission rules.

B. REGULATORY FLEXIBILITY ACT

11. An Initial Regulatory Flexibility Analysis is set forth in 7 FCC Rcd at 2671.

C. AUTHORITY

12. Authority for this rulemaking action is contained in 47 U.S.C. §§ 154(i), 154(j), 303(r), 309(g), 309(i), 403.

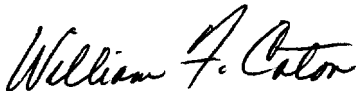
V. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED. That NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

14. IT IS FURTHER ORDERED. That pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, comments SHALL BE FILED on or before **July 22, 1994** and reply comments SHALL BE FILED on or before **August 8, 1994**. To file formally in this proceeding, commenters must file an original and four copies of all comments, reply comments, and supporting comments. If commenters want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters should file a copy of any such pleadings with the Office of General Counsel, Room 610, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Washington, D.C. 20554.

15. For further information, contact David S. Senzel, (202) 632-7220, Office of General Counsel.

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton
Acting Secretary

integration criterion was that, despite the Commission's long experience with integration, it had no empirical data as to integration's efficacy in promoting the public interest. We invite

commenters to submit any empirical data they might have concerning the comparative process or criteria or, alternatively, to submit any anecdotal evidence of the criteria's efficacy.